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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/617,590	07/11/2003	Mehdi M. Jafari	99-27 C1	3705

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EXAMINER

MITCHELL, TEENA KAY

ART UNIT

PAPER NUMBER

3743

DATE MAILED: 03/23/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/617,590	JAFARI ET AL.	
	Examiner	Art Unit	
	Teena Mitchell	3743	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 11 July 2003.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 47-73 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 47-73 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 11 July 2003 is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 7/11/03
- 4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: _____

DETAILED ACTION

Priority

While applicant has noted in the first paragraph of the specification that the instant application is a Continuation of 09/970,383 the status of the 09/970,383 should be noted. The 09/970,383 application is now U.S. Patent 6,626,175 and should also be listed in the first paragraph of the specification. Correction is requested.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 47-73 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 2, 4-10, 12-16, 18, 19, 21-24, 26-30, 32, and 33 of U.S. Patent No. 6,626,175. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 47, 50, and 63 are merely broader than the patented claims 1, 5, and 21. In reGoodman, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993).

Claim 47 (of the instant application) omits the following in line 4 of the patent, “...to a patient...” and in line 24 of the patent instead of, “...determined based on a product...” the instant application in lines 16 and 17 has “...determined based on both...”, Inasmuch as the omission of “a patient” and “determined based on both” are broader the patented claim 1 “anticipates” the application claim.

With respect to claim 50 (of the instant application) the claim omits the following from the patented claim 5, “...with a first limb having a first end operatively connected to the pressure generating system and a second end, and a second limb having a first end operatively connected to the exhaust assembly and a second end, wherein the second ends of the first and the second limbs are located proximal to an airway of a patient during use of the system...”, Therefore, the application claim is broader and the patented claim 5 “anticipates” the instant application claim.

With respect to claim 63 (of the instant application) the claim instead of “...determined based on a product...” which is in line 17 of the patented claim 23, the instant application has in lines 11 and 12, “...determined based on both...”, Inasmuch as the “determined based on both” is broader than the patented claim (21), the patented claim 21 “anticipates” the application claim.

With respect to claim 48 (of the instant application) the limitations are identical to claim 2 of the patent.

With respect to claim 49 (of the instant application) the limitations are identical to claim 4 of the patent.

With respect to claim 50 see note above.

With respect to claim 51 (of the instant application) the limitations are identical to claim 6 of the patent.

With respect to claim 52 (of the instant application) the limitations are identical to claim 7 of the patent.

With respect to claim 53 (of the instant application) the limitations are identical to claim 8 of the patent.

With respect to claim 54 (of the instant application) the limitations are identical to claim 9 of the patent.

With respect to claim 55 (of the instant application) the limitations are identical to claim 10 of the patent.

With respect to claim 56 (of the instant application) the limitations are identical to claim 12 of the patent.

With respect to claim 57 (of the instant application) the limitations are identical to claim 13 of the patent.

With respect to claim 58 (of the instant application) the limitations are identical to claim 14 of the patent.

With respect to claim 59 (of the instant application) the limitations are identical to claim 15 of the patent.

With respect to claim 60 (of the instant application) the limitations are identical to claim 16 of the patent.

With respect to claim 61 (of the instant application) the limitations are identical to claim 18 of the patent.

With respect to claim 62 (of the instant application) the limitations are identical to claim 19 of the patent.

With respect to claim 63 (of the instant application) see note above.

With respect to claim 64 (of the instant application) the limitations are identical to claim 22 of the patent.

With respect to claim 65 (of the instant application) the limitations are identical to claim 23 of the patent.

With respect to claim 66 (of the instant application) the limitations are identical to claim 24 of the patent.

With respect to claim 67 (of the instant application) the limitations are identical to claim 26 of the patent.

With respect to claim 68 (of the instant application) the limitations are identical to claim 27 of the patent.

With respect to claim 69 (of the instant application) the limitations are identical to claim 28 of the patent.

With respect to claim 70 (of the instant application) the limitations are identical to claim 29 of the patent.

With respect to claim 71 (of the instant application) the limitations are identical to claim 30 of the patent.

With respect to claim 72 (of the instant application) the limitations are identical to claim 32 of the patent.

With respect to claim 73 (of the instant application) the limitations are identical to claim 33 of the patent.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Teena Mitchell whose telephone number is (703) 308-4016. The examiner can normally be reached on Monday-Friday during normal business hours.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Henry Bennett can be reached on (703) 308-0101. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Teena Mitchell
Teena Mitchell
Examiner
Art Unit 3743
March 21, 2004